

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL COMMITTEE TO
FREE THE CUBAN FIVE
2489 Mission Street, #24
San Francisco, CA 94110

Plaintiff,

v.

BROADCASTING BOARD OF GOVERNORS
330 Independence Avenue, SW
Washington, DC 20237

Defendant.

Civil Action No. _____

COMPLAINT FOR INJUNCTIVE RELIEF

This action is brought under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.*, as amended. Plaintiff National Committee to Free the Cuban Five (Committee) seeks injunctive and other appropriate relief for the release of agency records requested by plaintiff from the Broadcasting Board of Governors (Board or BBG). The Board has unlawfully failed to disclose specific U.S. government-paid contracts with journalists requested by plaintiff that are within the possession and control of the Board, and has failed to respond to plaintiff's timely appeal as it pertains to these specifically identified contracts.

On January 23, 2009, the Committee to Free the Cuban Five submitted a request to the Broadcasting Board of Governors under the Freedom of Information Act. The Broadcasting Board of Governors and its Office of Cuba Broadcasting are responsible for the operation of Radio Marti and TV Marti, which broadcast into Cuba. These two entities are prohibited by anti-propaganda law from disseminating propaganda to a U.S. audience.

The Committee has repeatedly identified and requested production from the Board specific contracts with specific journalists, and has identified these contracts by name, number and date. The Board refuses to acknowledge and respond to this request, in direct violation of its obligations under the FOIA.

Although the Board to this date has failed to fully respond to the Committee's request, even the minimal disclosure by the Board evidences that there are journalists based in the United States, who publish in both print and broadcast media, and who have been paid by the propaganda-arm of the U.S. government, the Broadcasting Board of Governors, apparently without public disclosure of those payments and/or public disclosure of the services for which they were ostensibly contracted.

These journalists present the appearance of independence in their reporting which directly reaches the U.S. audience in Miami. Some of the Miami journalists were on the payroll of the U.S. government during the period from the arrests to the conviction of the Cuban Five. This period was rife with incendiary and false reporting from Miami-based reporters about the Cuban Five and the country of Cuba.

This is a stunning fact and a matter of great concern that requires immediate and full disclosure to know whether the U.S. government is improperly funding propaganda operations to influence the U.S. public on foreign policy as well as deliberations in jury rooms.

The public is entitled to know to what extent the U.S. government covertly paid journalists who wrote stories related to the case or about Cuban relations that were likely to reach and influence both the jury pool and the seated jury while the U.S. simultaneously carried out those prosecutions. If the U.S. government engaged in a covert operation of this nature, likely to affect what is supposed to be a fair trial process, it raises serious questions of government

misconduct and whether those prosecutions, which resulted in some life terms, were tainted by this activity.

This type of covert propaganda would also be a violation of the law which prohibits the Broadcasting Board of Governors from using its funds to influence U.S. public opinion, 22 U.S.C. § 1461 (Originally enacted as Section 501 of the U.S. Information and Educational Exchange Act of 1948, this law is commonly known as the Smith-Mundt Act). Yet the BBG pays journalists who publish stories in domestic media and who purport to be independent journalists. Now, being compelled under the Freedom of Information Act to disclose to the public specifically identified contacts with those journalists, the BBG has been unwilling to do so.

If the basis for domestically published reports about the activities of Cuba, including the Cuban Five, have been press articles written by journalists secretly on the payroll of the U.S. government, who are publishing to a U.S. audience in violation of U.S. law, it is imperative that the lack of neutrality of those reporters and the articles and information conveyed by them be identified. A number of journalists have in the past been identified as having contracted with the government. Oscar Corral, "10 Miami Journalists Take U.S. Pay," *Miami Herald*, Sept. 8, 2006, 1A. The records sought by this FOIA request, and unlawfully withheld by the BBG, have not previously been disclosed or produced. Nor has the matter of whether the U.S. government covertly funded reporters who placed stories supporting the U.S. prosecution of the Cuban Five in American media been addressed.

U.S. relations with Cuba are currently at the forefront of foreign policy deliberations. The U.S. government is making determinations about relations with the people of Cuba including economic policies that have dramatically affected the lives of people in the United States and

Cuba. Issues being discussed and debated include, among other things, the travel restrictions imposed on those who seek to visit to and/or from Cuba and the U.S. blockade of Cuba.

In amending the FOIA through the OPEN Government Act of 2007, Congress found that “the American people firmly believe that our system of government must itself be governed by a presumption of openness.” The Committee’s request is critical to the effort at transparency that is required in order for there to be an accurate accounting and assessment of the activities of the United States government in regard to Cuban relations, in regard to the right to a fair trial, and in regard to the right of the people of the U.S. to be free from government-sponsored covert propaganda.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to the Freedom of Information Act, 5 U.S.C. §§ 552(a)(3) and (a)(4)(B). This Court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.
2. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

3. Plaintiff National Committee to Free the Cuban Five (Committee) is a grassroots organization for the purpose of research, documentation and dissemination of the case of the “Cuban Five,” through printed publications, internet outreach, video documentaries and communications to the national and international media. The Committee is not a commercial enterprise for the purposes of the fee provisions of the FOIA. See 5 U.S.C. § 552(a)(4)(A)(iii). The Committee is a representative of the news media for purposes of the fee provisions of FOIA. See 5 U.S.C. § 552(a)(4)(A)(ii). A primary activity of the

Committee is to work in support of understanding and better relations between the people of the United States and the people of Cuba. The Committee's work includes addressing the issue of the media coverage in the United States and communication to the people of the United States regarding U.S. – Cuba relations.

4. Defendant Broadcasting Board of Governors is an agency of the United States within the meaning of 5 U.S.C. § 552(f)(1). The Board supervises all U.S. non-military international broadcasting services, including Voice of America, Radio Free Europe/Radio Liberty, Radio Free Asia, Radio and TV Marti, which is overseen by the Office of Cuba Broadcasting, and Radio Sawa and Alhurra Television. The Board's broadcasters reach over 175 million people per week in 60 languages around the world. An independent federal agency, the Board is charged with the duty to provide public access to documents in its possession consistent with the requirements of the FOIA and is denying plaintiff access to its records in contravention of public law.

Plaintiff's FOIA Request

5. On January 23, 2009, the Committee to Free the Cuban Five filed a request under the Freedom of Information Act with the Broadcasting Board of Governors.
6. The FOIA request sought production of records "in the possession of the Broadcasting Board of Governors and Office of Cuba Broadcasting, regarding all grants, payments and/or transfers to U.S. citizens, organizations and vendors, and Cuban citizens who are employed by U.S. media communications entities in television, newspaper, radio and Internet, from the Office of Cuba Broadcasting and the Broadcasting Board of Governors," as well as "any and all records, including correspondence and contracts

regarding the purpose of those grants, payments and/or transfers from the BBG and OCB to those individuals, organizations and vendors.”

7. The records sought in the FOIA request include “data, contracts, memoranda, letters, alerts, correspondence, applications, bulletins, e-mails, electronic postings, reports, notes, images, balance sheets or any other materials in the possession of the Broadcasting Board of Governors and Office of Cuba Broadcasting.”
8. The FOIA request encompassed records from “January 1, 1996 to the present.”
9. In its FOIA request, the Committee sought a waiver of fees associated with the request and explained that disclosure of the requested information was in the public interest as it would contribute significantly to public understanding of the operations and activities of the government, that the Committee had no commercial interest in the information, which was requested for dissemination to the public and for public education, and the means of dissemination to the public that would be utilized by the Committee.
10. The Committee, in its FOIA request also sought expedited processing of the request due to the urgent need to inform the public about alleged or actual unlawful government activity.
11. In its January 23, 2009 FOIA request, the Committee requested the BBG set forth the basis of any denial, in whole or in part, of its request, specifically requesting “If this request is denied in whole or in part, please provide the basis for each such denial or deletion by reference to the specific exemption of the Act which you assert is applicable.”
12. The FOIA specifically requested contracts regarding all grants, payments and/or transfers to U.S. citizens, organizations and vendors, and Cuban citizens who are employed by the U.S. media communications entities in television, newspaper, radio and Internet, from the

Office of Cuba Broadcasting and the Broadcasting Board of Governors, from January 1, 1996 to the present.

13. The Freedom of Information Act requires that “each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.” 5 U.S.C. § 552(a)(3)(A).
14. The FOIA mandates an agency determine whether to comply with a FOIA request within 20 days (excepting Saturdays, Sundays, and legal public holidays) after receipt of such request. 5 U.S.C. § 552(a)(6)(A)(i). The agency “shall immediately notify the person making such request of such determination and the reasons thereof, and the right of such person to appeal to the head of the agency any adverse determination.” 5 U.S.C. § 552(a)(6)(A)(i).
15. The FOIA mandates an agency “make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after receipt of such appeal.” 5 U.S.C. § 552(a)(6)(A)(ii).
16. If an agency fails to comply with the FOIA’s mandated time limits, it may not assess search fees, or where search fees are already prohibited by statute, duplication fees, for processing the request. 5 U.S.C. § 552(a)(4)(A)(viii).
17. In response to the FOIA request, the Board’s FOIA Officer, Martha Diaz-Ortiz contacted the Committee to indicate and seemingly, to facilitate, processing of the request.
18. To help facilitate processing, and due to the urgency of informing the public, the Committee provided to the Board on January 27, 2009, an initial list of 34 reporters for which it was seeking information. This was not a narrowing of the request but a good

faith effort to facilitate expeditious processing through prioritization, as the Committee informed the BBG that there were indeed additional names that should be searched.

19. On March 11, 2009, the Board provided to the Committee a summary chart entitled "Awarded Actions for All Vendors." That chart identified 16 reporters on the list submitted by the Committee to the Board. For each vendor, the chart identified contract numbers, identified as "actions," the award date for each action, the obligated amount, the contract type, current status of each contract and the release date, if any, of each contract.
20. This information was provided without the imposition of fees and the Board's March 11 response made no mention at all of the Committee's request for a waiver of fees.
21. The Board's March 11 response made no mention at all of the Committee's request for expedited processing.
22. On or about March 17, 2009 the Board identified the "Type of Service" for each "vendor" identified in its March 11, 2009 chart.
23. The Board has not provided the underlying contracts that were specifically requested in the Committee's January 23, 2009 FOIA request.
24. On March 11, 2009, the Board informed the Committee that it would impose fees for any additional information related to the request should the Committee submit additional names.
25. On March 17, 2009, the Board informed the Committee that it would impose search, review and duplication fees for the contracts in response to the Committee's FOIA request.

26. The Board never provided an initial written response to the Committee's request for a waiver of fees or request for expedited processing, which were properly included in the Committee's January 23, 2009 FOIA request.
27. The Board has never raised any substantive objection to disclosure of the contracts requested.
28. The Board has never asserted any statutory exemption to disclosure of the contracts requested.
29. On March 19, 2009, the Committee wrote to the Board to object to the belated imposition of fees and the Board's incomplete processing of the request and failure to produce information specifically requested.
30. The March 19, 2009 letter requested complete processing of the request without delay and reiterated the Committee's request for a waiver of fees. The letter also requested information in electronic format where available.
31. The March 19, 2009 letter reiterated the urgency of the disclosure and requested immediate production of specific contracts, which the Committee prioritized, while reserving objection.
32. The Committee submitted with the March 19 letter a spreadsheet identifying contracts by journalist name, contract number and date, stating "In the immediate, the Committee requests that the BBG produce the contracts as listed in the attached spreadsheet."
33. With regard to the identified contracts, the Committee offered to tender payment under protest for processing and stated "if payment is necessary for this request, please advise the sum you are seeking, which will be immediately tendered while reserving objection."

This was a good faith effort to facilitate processing of the request due to the urgency of informing the public.

34. The contracts are easily identifiable as the Committee provided the contract number, journalist and date for each specific contract sought.
35. The Committee, in its March 19, 2009 letter, again requested “[i]f the BBG is denying the Committee’s request, in whole or in part, please set forth in writing the reasons for any such denial as well as any process for appeal.”
36. The March 19, 2009 letter was first sent by email, which the Board had been using at its initiation to communicate with and transmit information to the Committee. After the email transmission, the Committee was informed the Board would not accept this communication by email and was given a fax number to which the March 19 letter was promptly transmitted on the same day.
37. The Board never responded to the Committee’s March 19, 2009 letter.
38. By letter dated March 31, 2009 the Committee inquired as to the status of any response to the March 19 letter. The Committee reiterated the positions of the March 19 letter, including the willingness to tender payment for processing of the requested contracts while reserving objection.
39. In its March 31, 2009 letter, the Committee again expressed the urgency of the information and attempted to facilitate processing by requesting the contracts it prioritized, stating, “[w]hile the Committee seeks a full response to its request, [in its March 19, 2009 letter] it identified particular information within that request that it is prioritizing.”

40. With its March 31, 2009 letter, the Committee again submitted its spreadsheet identifying by name, number and date the contracts it was prioritizing, again stating, “[G]iven the urgency of the information requested, the Committee is requesting the immediate production of the specific contracts set forth in the spreadsheet, which we are reattaching for your convenience.”
41. The March 31, 2009 letter was sent by facsimile to the number previously provided to the Committee by the Board.
42. The Board never responded to the Committee’s March 31, 2009 letter.
43. On May 4, 2009, the Committee filed an administrative appeal under the FOIA with the Board. As the Board had ceased communications with the Committee, the Committee submitted the appeal to the Board’s Chief FOIA Officer and requested forwarding of the appeal to the Access Appeal Committee for immediate processing.
44. In its appeal letter, the Committee reiterated its request for expedited processing and production in electronic format.
45. The Committee appealed the Board’s belated imposition of fees, the Board’s failure to completely process the request and the Board’s failure to respond to and communicate with the Committee since the submission of the Committee’s March 19, 2009 letter.
46. In its appeal, the Committee again submitted the spreadsheet identifying specific contracts by name, number and date, stating, “However, as stated and re-stated, the urgency of informing the public is so great that the Committee is willing to tender payment, under challenge while this appeal is pending, for the processing of information. Again, while the Committee seeks a full response to its request, it has identified particular

information that it is prioritizing, as reflected in the spreadsheet attached and previously provided to the BBG.”

47. In its May 4, 2009 Appeal, the Committee reiterated and sought determination on its requests for a waiver of fees and for expedited processing pursuant to the FOIA.
48. On June 3, at 9:10 pm, the Board faxed to the Committee what it claimed was an estimate of fees for processing the full FOIA request. There was no mention in the breakdown provided of the specific contracts the Committee had identified as information it was prioritizing and had requested in its multiple communications with the Board, communications to which the Board refused to respond.
49. The Board asserted that its estimate of fees for processing the Committee’s full FOIA request is \$31,192.80. The estimate includes \$10,672.80 for a search of the “BBG Office of Contracts.” There is no estimate for search regarding the contracts the Committee prioritized, specifically identified by name, number and date, and for the processing of which the Committee specifically stated its willingness to tender payment under protest.
50. The \$31,192.80 estimate is for a search were the FOIA request interpreted at its fullest possible scope. Putting aside the fact that this figure is plainly inflated and moreover that the Board cannot properly charge fees to the Committee, in efforts to facilitate response in the immediate, the Committee repeatedly prioritized and distinguished the production of the specifically identified contracts for which the Committee possessed and presented the contract number, vendor/journalist names and contract date. It stated that it would tender payment under protest for these specific documents.

51. The Board has flatly refused to comply with this request, has refused to provide an estimate for production of the specifically identified contracts or to actually produce the specifically identified contracts themselves.
52. It is evident that any asserted cost for retrieving and producing the specifically identified contracts would be nominal and that the Board's intent is to withhold these documents from the public as it is doing.
53. The minimal list of vendors and contracts previously produced by the Board in response to the Committee's request was allegedly compiled from a database. The contracts identified by the Committee would be easily identified and located through a search of this and/or similar databases.
54. The Committee identified these prioritized contracts by name, number and date. These contracts are searchable on this identifying information and are easily recovered and disclosed by the Board, without hours and hours of search.
55. The Board has never stated any objection or asserted any exemption to disclosing the contracts identified by the Committee, or to any information requested by the Committee.
56. On June 4, 2009, the Committee received by Federal Express the Board's response to its May 4, 2009 appeal in the form of a letter from the Access Appeal Committee. The response was dated June 3, 2009. This was the first response from the Board that seemingly sought to respond to the Committee's concerns expressed and re-stated in its March 19 and March 31 letters, and in the Committee's May 4, 2009 appeal.
57. In its June 3 response, the Access Appeal Committee for the first time responded to the Committee's requests for fee waiver and expedited processing, which were included in and submitted with the Committee's January 23, 2009 FOIA request. The Access Appeal

Committee, in its June 4 response, denied the Committee's requests for a fee waiver and expedited processing.

58. The Access Appeal Committee's two page response contained no reference, neither directly nor indirectly, to the Committee's request for production of specific, easily identifiable contracts.
59. The Access Appeal Committee made no reference to the Committee's willingness to tender payment for these specific contracts under challenge.
60. The Access Appeal Committee's response raised no substantive objection nor did it assert any statutory exemption to production of the identified contracts.
61. On June 26, 2009, in a letter sent by facsimile and first class mail, the Committee responded to the Board's June 3, 2009 estimate of fees.
62. In its June 26, 2009 letter the Committee again demanded production of the specific contracts requested and stated **"This is our final demand for immediate production of these underlying [particular contracts]. We seek to avoid litigation and have endeavored to do so, however, the refusal to produce these documents is arbitrary and capricious and in willful violation of the Freedom of Information Act, particularly given this refusal persists even after the requestor satisfied your demand that it would assume full responsibility for associated fees and costs for these documents."** (emphasis in original).
63. The Committee's June 26 letter cited language from its March 19 and March 31 letters where it specifically agreed to tender payment while reserving objection for the production of the specified contracts.

64. The Committee noted the Access Appeal Committee's failure in its response to the May 4, 2009 appeal to "address the failure to produce the underlying contracts regarding which the National Committee to Free the Five had represented in writing an assumption of financial responsibility for all associated costs, while reserving and without waiving any objection to the imposition of such documents."
65. The June 26 letter from the Committee addressed the BBG's refusal to acknowledge that the Committee had complied even with BBG's improper demands for assumption of costs to receive the requested contracts, "Having represented in March 19, 2009, the assumption of financial responsibility for the fees and costs associated with the production of the underlying contracts, and reiterated that assumption in its March 31, 2009 correspondence, and appealed the failure to produce these documents notwithstanding the assumption of these costs, BBG still refuses to produce the documents on the basis that the National Committee to Free the Five must first assume the financial responsibility for the production of the contracts."
66. The June 26 letter specifically stated **"With respect to the underlying contracts that have been identified to date, we continue to request, as we have in all of our correspondence, the delivery of those contracts immediately. The requestor has stated it shall tender and assume full responsib[ility] for payment of associated costs for these documents, reserving the right to continue to assert its objections to the assessment of such costs. If there is any basis for your continued failure to produce these documents, please so advise in written response to this communication."** (emphasis in original).

67. In its June 26, 2009 letter, the Committee also addressed the Board's demand for payment of "\$31,192.00 plus duplication costs" as an initial payment toward estimated "costs for the search and duplication" of the broader and full scope of materials responsive to the Committee's FOIA request.
68. The June 26 letter inquired for clarification as to how the excessive costs were estimated and whether the asserted costs could be reduced. It requested an itemization of the fees and noted it would consider narrowing or redefining the request if that would serve to facilitate production and lower costs.
69. The Committee, in its June 26, 2009 letter also informed the Board that under the FOIA, the claimed costs cannot be imposed due to the BBG's failure to timely issue a determination as to the Committee's January 23, 2009 FOIA request. See 5 U.S.C. § 552(a)(4)(A)(viii). Despite this bar to fees, the Committee stated its willingness to discuss reformulating or limiting the request if doing so could result in production of the material deemed relevant by the Committee and reduce the burden of response upon the agency.
70. The Committee informed the Board that it would appeal the assessment of fees because such imposition is barred by the FOIA. Notwithstanding such appeal, the Committee requested the Board withdraw the proposed assessment of fees and produce the requested materials.
71. On June 26, 2009, by separate letter addressed to the Access Appeal Committee and sent by first class mail and facsimile, the Committee submitted a second appeal to the BBG. The Committee appealed the assessment of search and duplication fees in violation of the FOIA and appealed and requested the Access Appeal Committee reconsider its

declination to recognize a fee waiver for the requestor, including specifically as a “representative of the news media.”

72. In its second appeal the Committee appealed the imposition of any fees for processing the Committee’s request. The Committee noted that pursuant to the 2007 amendments to the Freedom of Information Act agencies may not assess fees if the agency failed to comply with the 20-day deadline for issuing a determination as to the underlying FOIA request, see 5 U.S.C. § 552(a)(4)(A)(viii), absent exceptional circumstances, see 5 U.S.C. § 552(a)(6)(B)(i). The Committee noted that no determination letter issued from the Board within the 20-day period after receipt of the Committee’s FOIA request and that the Board had not requested an extension of this period. The Committee appealed the imposition of fees on this basis.
73. In its second appeal, the Committee also sought reconsideration of the Access Appeal Committee’s fee waiver denial. The Committee noted the Access Appeal Committee’s failure to determine the National Committee to Free the Five’s status as a “representative of the news media” and requested it specifically address this issue.
74. To assist the Access Appeal Committee in reaching a correct and appropriate determination, the second appeal included supplementary information. The second appeal explained the National Committee to Free the Cuban Five is an entity that gathers information of potential interest to a segment of the public and which uses its editorial skills to turn raw materials and information into a distinct work and which distributes that work to an audience. The second appeal submitted that The National Committee to Free the Cuban Five disseminates its work through a variety of media formats, including hard copy, electronic dissemination and through audio-video media.

75. The second appeal included exhibits and examples demonstrating the National Committee to Free the Five's publication and dissemination of flyers, leaflets and brochures, both in English and in Spanish, on the subject of Cuba, U.S. policies, the incarceration of Cuban nationals and the failure of the United States to prosecute persons, including Luis Posada Carriles, who have engaged in acts of terrorism against Cuba; the National Committee to Free the Five's aggregation of information from an array of sources and use of editorial discretion in selecting, presenting and disseminating such source articles and information to its audience and the public; its publication of advertisements conveying and reporting information to the general public; its organizing and hosting educational seminars and press conferences to convey information; and its arrangement of many media interviews of persons who are primary actors or news makers.
76. The second appeal set forth the expectation of publication and dissemination of the subject matter of the January 23, 2009 FOIA request by, among other ways, publication of news articles by freelance journalist and National Committee to Free the Cuban Five representative Gloria La Riva.
77. By letter dated July 15, 2009 and sent by facsimile at 8:37 pm, Martha Diaz-Ortiz of the BBG responded to the Committee's June 26, 2009 letter regarding the Board's fee estimate. The July 15 letter allegedly was in response only to the Committee's stated willingness to consider reformulating its request and stated, "This is in partial response to your letter dated June 26, 2009, regarding narrowing the scope of your FOIA request. Your letter was received on June 30, 2009. All other concerns expressed in your letter will be reviewed and addressed by the FOIA Appeals Committee."

78. The Board's July 15, 2009 letter suggested that pre-2005 searches for responsive information may prove fruitless and asserted that certain documents are no longer retained after three to six years.
79. The July 15 letter also suggested that the submitters of identified contracts would have to be notified and allowed opportunity to object to disclosure pursuant to Executive Order 12600.
80. The July 15 letter suggested the Committee narrow its search "by first obtaining a list of all the POV contracts entered into with the Office of Cuba Broadcasting during a specific time period surrounding the trial of the 'Cuban Five.' You will then be able to identify the journalist(s) who were contracted with the agency before and during the trial and directives, if any, that surrounded the reporting activities of the journalist(s) at that time."
81. The July 15 letter stated "Once you have narrowed the scope of your request, we can reassess the estimate of the costs for the search of documents."
82. The Board's July 15 letter did not, as the Committee previously requested, provide an itemization of estimated costs, nor did it identify the costs specifically associated with processing the specified contracts.
83. The Board's July 15 letter did not at all address the specific contracts previously repeatedly identified and requested by the Committee in each of its communications, and regarding which the Committee repeatedly agreed to assume costs while reserving objection.
84. On July 16, 2009, the Committee responded in part to the Board's July 15 letter. Regarding the scope of the FOIA request, the Committee noted that in its communications it had clearly distinguished between the fullest possible scope of the

FOIA request and the very specific contract documents it had repeatedly focused on and requested. The Committee noted the Board's continued failure to respond to the demand for immediate production of the particular and specified contract documents.

85. With regard to the Board's suggestion that certain contracts may no longer exist, the Committee noted the Board's failure to state whether any efforts have been taken to preserve the materials notwithstanding their specific identification as subject to the pending FOIA request.
86. With regard to the Board's reference to Executive Order 12600 and new suggestion that the government-generated contracts may somehow constitute trade secrets or confidential commercial information that may not be subject to disclosure, the Committee noted there is no basis in law for such suggestion.
87. The July 16 letter again requested production of the contract documents and offered to send a person to inspect and copy the documents that day if the BBG would make them available.
88. By letter dated July 27, 2009, the Access Appeal Committee responded to the National Committee to Free the Five's second appeal.
89. The July 27, 2009 response found that the Board's June 3, 2009 assessment of search and duplication fees in the amount of at least \$31,192.80 was valid and affirmed denial of the fee waiver request stating, "You have provided no new information that would affect the [Access Appeal] Committee's analysis of denying that request. The July 27, 2009 response also stated that "The Appeals Committee does not find that the National Committee to Free the Cuban Five is a television or radio broadcaster or a publisher of periodicals who make their products available for purchase or subscription to the general

public.” Further demonstrating the Board’s improper basis for fee-waiver denial, this is not an accurate definition for the purposes of the FOIA.

90. The BBG again refused to itemize or isolate the search fees, if any are even possible or lawfully imposed given the specificity of contract identification, even though the Committee had long expressly agreed in writing to tender payment of such fees, in full, under protest.
91. The July 27, 2009 response quoted from the Committee’s request in its June 26, 2009 letter regarding BBG’s failure to distinguish the minimal costs associated with producing the underlying contracts. Despite the Committee’s statements in its June 26, 2009 letter and in each of its March 19, March 31 and May 4 correspondence of its willingness to advance payment for the contracts while reserving objection, the Access Appeal Committee in its July 27 response continued to ignore these requests and stated “Because you have not agreed to pay the estimated costs at this time, the time limits have been waived and you must still exhaust administrative remedies before seeking judicial review.”
92. The National Committee to Free the Five has repeatedly agreed to pay costs for the particular and specified contracts under protest and requested immediate production of these contracts in its March 19, 2009 letter, again in its March 31, 2009 letter, in its May 4, 2009 appeal, its June 26, 2009 letter and its July 15, 2009 letter.
93. All proffers of payment and requests for production have been ignored by the Board in its response letters and by the Access Appeal Committee in its two response letters.
94. The White House issued a Memorandum for the Heads of Executive Departments and Agencies dated January 21, 2009 which states in part, “All agencies should adopt a

presumption in favor of disclosure, in order to renew their commitment to the principles embodied in the FOIA, and to usher in a new era of open Government.”

95. The Board’s responses have completely and deliberately ignored the Committee’s stated and re-stated requests for these easily identifiable contracts, in contravention of the principles of openness embodied in the FOIA.
96. The Board is obligated under the FOIA to promptly disclose these specifically identified contracts to the Committee. See 5 U.S.C. § 552(a)(3)(A).
97. It has been almost nine months since the Committee filed its request. There has been no assertion of exemption and no proper request for additional time needed under the statute. No additional time is needed to locate and disclose contracts the Committee has identified by name, number and date.
98. The Board is obligated under the FOIA to produce the contracts in electronic format where available. The FOIA mandates “In making any record available to a person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily producible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for the purposes of this section.” 5 U.S.C. § 552(a)(3)(B).
99. The FOIA precludes the imposition of search fees, or for requests not sought for commercial use made by representatives of the news media, educational institutions or noncommercial scientific institutions, duplication fees, if the agency fails to comply with any of the time limits set by the FOIA absent unusual circumstances. 5 U.S.C. § 552(a)(4)(A)(viii).

100. The BBG failed to comply with the 20-day deadline for issuing a determination as to the Committee's FOIA request and failed to inform the requestor of assertion of unusual circumstances pursuant to the FOIA.
101. Under the FOIA, a representative of the news media is "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." 5 U.S.C. § 552(a)(4)(A)(ii)(III).
102. The National Committee to Free the Cuban Five is a representative of the news media as defined by the FOIA and for fee purposes of the FOIA.
103. The FOIA provides for expedited processing of a request when there is an urgent need to inform the public of actual or alleged federal government activity and the requestor is primarily engaged in the dissemination of information. 5 U.S.C. § 552(a)(6)(E)(i).
104. The National Committee to Free the Cuban Five's January 23, 2009 FOIA request qualifies for expedited processing under the FOIA, as the Committee, as a representative of the news media, is primarily engaged in the dissemination of information, and there is an urgent need to inform the public of actual or alleged unlawful federal government activity regarding funding of domestic propaganda in apparent violation of the Smith-Mundt Act and covert efforts by the U.S. government to fund reporters in Miami whose articles may have tainted the jury pool and sitting jury while the U.S. was conducting the prosecution of the Cuban Five.

CAUSE OF ACTION

Claim One (Violations of the Freedom of Information Act)

105. Plaintiff repeats and realleges paragraphs 1 – 104.

106. The Broadcasting Board of Governors has wrongfully withheld agency records requested by plaintiff, thereby violating plaintiff's right to this information under the Freedom of Information Act.
107. The Board has failed to disclose the contracts promptly upon request under the Freedom of Information Act.
108. The Board has failed to respond to plaintiff's March 19, 2009 letter, March 31, 2009 letter, May 4, 2009 administrative appeal, June 26, 2009 letter and July 15, 2009 letter with regard to the request for contracts that is the subject of this Complaint.
109. The Board has improperly and unlawfully denied plaintiff's request for a fee waiver under the FOIA.
110. The Board has improperly and unlawfully affirmed the Board's denial of a fee waiver upon plaintiff's appeal.
111. The Board has improperly and unlawfully denied plaintiff's request for expedited processing upon plaintiff's appeal.
112. Plaintiff has exhausted the applicable administrative remedies with respect to defendant Broadcasting Board of Governor's wrongful denial of a fee waiver.
113. Plaintiff has exhausted the applicable administrative remedies with respect to defendant Broadcasting Board of Governor's wrongful denial of expedited processing.
114. Plaintiff has exhausted the applicable administrative remedies with respect to defendant Broadcasting Board of Governor's wrongful withholding of the requested contracts.
115. The Board is precluded under the FOIA from the charging of fees.
116. Plaintiff is entitled to injunctive relief with respect to the expedited release and disclosure of the requested contracts without the charging of fees.

Claim Two
(Administrative Procedures Act)

117. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.
118. Plaintiff is entitled to judicial review, pursuant to the Administrative Procedures Act, of defendant's actions concerning its unlawful policies and practices regarding plaintiff's request for records under the FOIA.
119. Plaintiff is entitled to judicial review, pursuant to the Administrative Procedures Act, of defendant's denial of plaintiff's May 4, 2009 and June 26, 2009 administrative appeals with regard to plaintiff's request for fee waiver.
120. Plaintiff is entitled to judicial review, pursuant to the Administrative Procedures Act, of defendant's denial of plaintiff's May 4, 2009 administrative appeal with regard to plaintiff's request for expedited processing.
121. Plaintiff is entitled to judicial review, pursuant to the Administrative Procedures Act, of defendant's failure to respond to plaintiff's May 4, 2009 administrative appeal with regard to the request for contracts that is the subject of this Complaint.
122. Defendant has unlawfully withheld and/or unreasonably delayed agency action by failing to comply with the mandates of FOIA regarding plaintiff's FOIA request and appeal.
123. Defendant's actions regarding plaintiff's FOIA request and appeal are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law.


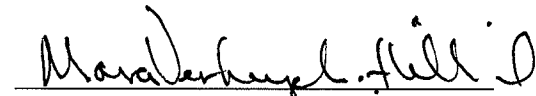
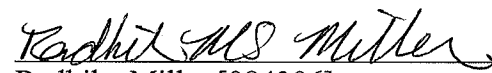
PRAYER FOR RELIEF

Wherefore, plaintiff prays that this Court:

- A. Order that defendant Broadcasting Board of Governors be enjoined from withholding the specified requested contracts pursuant to the Freedom of Information Act;
- B. Order defendant Broadcasting Board of Governors to process immediately the request for specifically identified contracts;
- C. Order defendant Broadcasting Board of Governors, upon completion of such processing, to disclose the requested contracts in their entirety and make copies available to plaintiff;
- D. Order the defendant Broadcasting Board of Governors to disclose the requested contracts in their entirety without the charging of fees;
- E. Order defendant Broadcasting Board of Governors to disclose the requested contracts in their entirety in electronic format;
- F. Declare that the Broadcasting Board of Governors may not impose fees for the remainder of the processing of the Committee's FOIA request in light of 5 U.S.C. § 552(a)(4)(A)(viii) and remand the matter for further processing consistent with the Court's declaration;
- G. Award plaintiff its costs and reasonable attorneys fees incurred in this action; and
- H. Grant such other relief as the Court may deem just and proper.

September 9, 2009

Respectfully submitted,


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